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IN THE

Supreme Court of the United States

October Term, 1970

Number 1165

JOHNSON E. FOMBY and
HAROLD WHITE,

Petitioners,

vs.

THE STATE OF GEORGIA,

Respondent.

PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

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PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

Now comes JOHNSON E. FOMBY and HAROLD WHITE, petitioners in certiorari, and petitions this Honorable Court for the writ of certiorari to issue to the Court of Appeals of the State of Georgia to review the judgment and opinion of said Court entered in the case of JOHNSON E. FOMBY vs. THE STATE, HAROLD WHITE vs. THE STATE, on the 10th day of September, 1969.

OPINION BELOW

The opinion of the Court of Appeals of Georgia is reported unofficially in 170 S.E. Reporter, 2nd, p. 585. The opinion of the Court of Appeals is appended hereto.

JURISDICTION

The judgment of the Court of Appeals of Georgia was entered on September 10, 1969, and a timely motion for rehearing filed September 19, 1969 was denied September 24, 1969. A petition for certiorari was filed in the Supreme Court of Georgia on October 23, 1969 and denied by that Court without opinion on November 12, 1969.

Jurisdiction of this Court is invoked under Title 28, U.S.C. 1257 (3), giving this Court jurisdiction to grant certiorari to the final judgment of the highest court of a State in which a decision could be had, where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States.

QUESTIONS PRESENTED

1. Are State search warrants issued for the search of "John Doe" in the vicinity of named streets specific enough as to the place to be searched and person to be seized to comply with the provisions of the 4th Amendment to the Constitution of the United States as applied to the states by virtue of the 14th Amendment to the Constitution of the United States, or are the same general warrants?

2. Are "John Doe" search warrants lawful which are issued generally "To all peace officers of the State of Georgia," to search John Doe in the vicinity of named

streets, when only the affiant police officer has personal knowledge as to the identity of the John Doe, or does the same violate the provisions of the 4th Amendment to the Constitution of the United States as applied to the states by virtue of the 14th Amendment to the Constitution of the United States?

3. Are State search warrants issued for the search of "John Doe" in the vicinity of named streets "the accused and any other person on said premises who reasonably might be involved in the commission of the aforesaid violation of the laws of Georgia" specific enough as to the place to be searched and person to be seized to comply with the provisions of the 4th Amendment to the Constitution of the United States as applied to the states by virtue of the 14th Amendment to the Constitution of the United States, or are the same general warrants authorizing the search of all persons who may come within the vicinity of the named streets and become suspect by the officer executing the search warrants?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT FOUR to the Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT FOURTEEN to the Constitution of the United States:

> "No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Separate accusations in unrelated cases were brought against petitioners in the Criminal Court of Fulton County, in the State of Georgia for the offense of keeping, maintaining, and operating a lottery, known as the numbers game, for the hazarding of money, (Fomby R. 4) (White R. 4), after trial before the Court without a jury, each was found guilty (Fomby R. 8) (White R. 8) and each sentenced within the terms provided by State law (Fomby R. 9) (White R. 9). Appeals were filed to the Georgia Court of Appeals (Fomby R. 3) (White R. 3) and the judgments of the Criminal Court of Fulton County were affirmed (Fomby R. 62) (White R. 57). The Court of Appeals of Georgia, for the purpose of their opinion, combined the two cases because of the similarity of legal questions presented, (Fomby R. 58) (White R. 53). A motion for rehearing was filed jointly by petitioners (Fomby R. 63) (White R. 58) and was denied by the Court of Appeals (Fomby R. 67) (White R. 62). Application for certiorari was then jointly made by petitioners to the Supreme Court of Georgia (Fomby R. 68A) (White R. 63). Certiorari was denied by the Supreme Court of Georgia (Fomby R. 68B) (White R. 64).

Prior to their respective trials, petitioners, hereinafter called defendants, filed written motions to suppress evidence (Fomby R. 5) (White R. 5) insisting that the search warrants (Fomby R. 50) (White R. 46) were

general warrants in that the respective warrants failed to specifically describe the place to be searched, as required by the Fourth Amendment and the Fourteenth Amendment to the Constitution of the United States (Fomby R. 5) (White R. 5) and the evidence seized thereunder should be suppressed. The respective motions to suppress evidence were overruled (Fomby R. 7) (White R. 7) and the evidence seized thereunder was admitted into evidence against them (Fomby R. 18-27); (White R. 19-20).

REASONS RELIED UPON FOR GRANTING WRIT OF CERTIORARI

1. The Georgia Court of Appeals, in relying upon the case of Steele versus United States, 267 U.S. 498, 503, misconstrued and misinterpreted the question therein decided, and has thus permitted "John Doe" search warrants to issue without a specific description of the place to be searched being set forth and, therefore, has authorized the issuance of general search warrants.

2. The Georgia Court of Appeals has permitted search warrants to issue generally "To all peace officers of the State of Georgia" when, in fact, only the affiant officer could possibly have any indication as to the place to be searched or the persons to be seized.

3. The Georgia Court of Appeals in holding "physically described persons in a specific *vicinity*" (italics added) is specific enough to meet the requirements of the United States Constitution, has greatly broadened the requirements of the Fourth Amendment requiring "No Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly de-*

scribing the place to be searched, and *the persons* or things to be seized." (italics added) without legal precedent.

4. The Georgia Court of Appeals has construed vicinity to be synonomous with place, as used in the Fourth Amendment, and has thereby weakened the protection of privacy afforded by said Amendment, without legal precedent therefor.

5. The questions involved are of the utmost importance in the administration of justice, in balancing the right of privacy of citizens, with the authority permitted law enforcement officers.

6. The questions involved are important in that there are no previous decisions construing the particularity of description required by the Fourth Amendment as to the place and person when the person is not named, and only a vicinity is described rather than a place.

7. The questions involved are important in that there are no previous decisions construing the legality of a search warrant authorizing the search of "the accused and any other person on said premises who reasonably might be involved in the commission of the aforesaid violation of the laws of Georgia," when the premises are described as the vicinity of public streets.

ARGUMENT OF REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

The Georgia Court of Appeals relied upon the case of Steele v. United States, 267 U.S. 498 as authority for their holding in the instant case. This was an incorrect application of the Steele case (supra) in that the facts of that case were that the search warrant was directed to-

wards a named person at a particularly described address and even though the building at that address bore two different street numbers the warrant authorized the search of the entire building, and it was further shown that each occupant of the searched building had access to all portions of the building. This is a far different factual situation than that presented in the instant case in which the warrant was directed towards an unnamed person, at an undefined location but merely in the vicinity of certain streets, which by its very nature, encompasses many persons and many places within the vicinity described. The warrant in the instant case did not stop with this authorization alone but went further and authorized the search of "the accused and any other person on said premises who reasonably might be involved in the commission of the aforesaid violation of the laws of Georgia." This language must be construed in conjunction with Section 27-306, Code of Georgia, Annotated (Ga. Laws Acts 1966 pp. 567, 569) which provides "The warrant shall be executed within 10 days from the time of issuance. - - -"

The authority in the warrant was directed "To all peace officers of the State of Georgia" even though Georgia law provides for limiting the persons who may execute the warrant, as follows:

> "Persons authorized to execute search warrants. The warrant shall be issued in duplicate and shall be directed for execution to all peace officers of the State. However, the judicial officer may direct the warrant to be executed by any peace officer named specifically therein."

Section 27-305, Code of Ga., Annotated (Ga. Laws, Acts 1966 pp. 567, 569.)

Thus, if the issuing judicial officer had followed the latter provision of the above stated statute he could have to some degree avoided the general nature of the search warrant, but this was not done.

Therefore, it would seem that under the terms of the search warrant involved and the state statutes cited the issuing judicial officer authorized any peace officer of the State of Georgia to search any person coming within the vicinity of the named public streets at any time within a 10 day period, who may become suspect to the officer, without the necessity of the executing officer submitting any probable cause as to the other persons to be searched whoever they might be.

The writer of this petition cannot conceive of a more general search warrant or one more violative of the rights protected by the 4th and 14th Amendments to the United States Constitution.

CONCLUSION

The petition for writ of certiorari should be granted, and the judgment of the Court of Appeals of Georgia should be reversed for failing to accord petitioners their rights as protected by the 4th and 14th Amendments to the Constitution of the United States, and because the decision sets a legal precedent endangering the right of privacy of all citizens of Georgia.

Respectfully submitted,

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Decided: September 10, 1969

APPENDIX

In the Court of Appeals of Georgia

JOHNSON E. FOMBY

v.

THE STATE.

HAROLD WHITE

v.

THE STATE.

Nos. 44776, 44777.

Syllabus Opinion by the Court

BELL, Chief Judge.

Defendants were convicted of operating a lottery for the hazarding of money. Both cases raise on appeal the same issue, the overruling of a motion to suppress evidence of lottery paraphernalia seized from the defendants.

The warrant in the Fomby case described the person and place to be searched as "John Doe @ Blue" and "on or about his person or auto (or truck) in the vicinity of Magnolia and Sunset, vehicle being either a green pickup truck or a blue and white Ford." In the White case, the warrant gave the description of the person as John Doe and "on or about his person in the vicinity of Simpson Rd. and Chappel Rd." The warrants were issued on affidavits which contained a physical description of

the individuals. The sworn affidavits were based on information from a reliable informant and on prior personal observation of the respective officers. The officers making the affidavits conducted the search under the warrants. Both warrants were directed for execution to all peace officers of the State in compliance with Code Ann. § 27-305. It was stipulated that the evidence against the defendants was obtained by the execution of the warrants and not pursuant to a lawful arrest.

Defendants contend that the warrants contain an insufficient description of the persons and places to be searched and therefore are general warrants. Argument is also made that directing the execution of the warrants to all peace officers compounded the general nature of the warrants as it authorized the execution by an officer who did not have the personal knowledge of the officers obtaining them as there would be many persons and automobiles fitting the description at the respective localities and any other police officer could search at random.

[1-3] The descriptions in these cases were specific enough to meet the requirements of the United States and Georgia Constitutions. The searches were limited in their scope to physically described persons in a specific vicinity. It is enough if the description sufficiently permits a prudent officer with a search warrant to be able to locate the person and place definitely and with reasonable certainty. Steele v. State, 118 Ga.App. 433, 434, 164 S.E.2d 255; Steele v. United States, 267 U.S. 498, 503, 45 S.Ct. 414, 69 L.Ed. 757. The trial court did not err in overruling the motions to suppress the evidence.

Judgments affirmed.

EBERHARDT and DEEN, JJ., concur.

COURT OF APPEALS
OF THE STATE OF GEORGIA

Atlanta, September 10, 1969

The Honorable Court of Appeals met pursuant to adjournment.

The following judgment was rendered:

J. E. Fomby v. The State

This case came before this court on appeal from the Criminal Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. Bell, P.J., Eberhardt and Deen, JJ., concur.

Bill of Costs, $30.00.

COURT OF APPEALS
OF THE STATE OF GEORGIA

Atlanta, September 10, 1969

The Honorable Court of Appeals met pursuant to adjournment.

The following judgment was rendered:

Harold White v. The State

This case came before this court on appeal from the Criminal Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. Bell, P.J., Eberhardt and Deen, JJ., concur.

Bill of Costs, $30.00.